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International Law--Extraterritoriality--Antitrust Law--Development of the Defense of Sovereign Compulsion

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NOTES

INTERNATIONAL LAW—EXTRATERRITORIALITY—ANTITRUST LAW—Development of the Defense of Sovereign Compulsion

Recent decades have witnessed a remarkable and continuing expansion of American business abroad. This expansion has generally been viewed as desirable and in accord with American national interests and economic policies. However, such expansion has had the drawback of exposing American businesses to the demands of the various economic laws, policies, and customs of the countries into which they have moved. American courts have consistently held that an American business operating abroad is subject to the jurisdiction of the United States antitrust laws when the activities of the business substantially affect interstate or foreign commerce.[1] This extraterritorial application of the federal antitrust laws has confronted businessmen doing business abroad with conflicts between American law and the law of the foreign country in which they are operating.

One of the most troublesome of these conflicts arises when an American business abroad is subjected to an order of a foreign government and the carrying out of that order requires that business to violate the antitrust laws of the United States. The recent case of *Interamerican Refining Corporation v. Texaco Maracaibo, Incorporated*[2] confronted an American court with this precise issue for the first time.[3] The United States District Court for the District of Delaware responded by saying that the defendants had been compelled to act as they did by the orders of a foreign sovereign government,[4] and it held that such "sovereign compulsion," when proved,

1. The Supreme Court, in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962), citing prior decisions going back to United States v. American Tobacco Co., 221 U.S. 106 (1911), held that the antitrust jurisdiction of the United States federal courts extended to a conspiracy to restrain the foreign or domestic commerce of the United States even though the conduct complained of occurred in a foreign country. *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945), in which the Court of Appeals for the Second Circuit held that even a foreign company acting in a foreign country was subject to United States antitrust laws if its activities substantially affected American commerce and if such effects were intended by that foreign company.

2. 307 F. Supp. 1291 (D. Del. 1970).

3. There was no jurisdiction question in the *Interamerican* case. All parties were American corporations, and, while the activity complained of by the plaintiff took place partly in Venezuela, the agreement and subsequent conduct of the defendants affected American foreign commerce. As a result, the question of jurisdiction fell squarely within the language of the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962), discussed in note 1 *supra*. This Note will assume that jurisdiction is present whenever the applicability of the defense of sovereign compulsion is under discussion.

4. 307 F. Supp. at 1296.

constitutes a complete defense to an antitrust action.[5] It is the purpose of this Note to explore this newly promulgated doctrine of sovereign compulsion in order to determine the basis on which it is founded and the practical difficulties and consequences that may result from its application.

I. The Interamerican Decision

A. *Background*

The plaintiffs in *Interamerican* brought an action under the Sherman[6] and Clayton[7] Acts, alleging that the defendants had engaged in a "concerted boycott designed to deny Interamerican Venezuelan crude oil required for its operations."[8] Interamerican was an American corporation engaged in the business of processing Venezuelan crude oil at its bonded refinery in Bayonne, New Jersey.[9] The principal stockholders of Interamerican were Venezuelan nationals, two of whom were *personae non gratae* to the present Venezuelan Government.

Defendants Texaco Maracaibo, Incorporated (Supven)[10] and Monsanto Venezuela, Incorporated (Monven)[11] held concessions from the Venezuelan Government for the production of crude oil. In the course of their operations, they supplied crude oil to defendant Amoco Trading Company, an American company that was not actually operating within Venezuela.[12] Interamerican contracted to obtain its crude oil through Amoco and thereafter received three shipments.[13]

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5. 307 F. Supp. at 1296.

6. Sherman Antitrust Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1964). Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, *or with foreign nations*, is declared to be illegal . . ." (emphasis added).

7. Clayton Act § 4, 15 U.S.C. § 15 (1964). Section 4 of the Clayton Act provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

8. 307 F. Supp. at 1292.

9. Interamerican planned to place its refined oil on the market at a low price by processing it in a bonded refinery and then exporting it or selling it as ship's bunker —fuel oil that the ship uses itself—in New York harbor, thereby avoiding United States import quota and tariff restrictions. 307 F. Supp. at 1292.

10. Texaco Maracaibo was formerly the Superior Oil Company of Venezuela (Supven).

11. Monsanto Venezuela, Inc. (Monven) was a wholly owned subsidiary of defendant Monsanto Company.

12. As a trading company, Amoco was the middle man between refineries and producers of crude oil in Venezuela and other countries. In the instant case, Amoco loaded the crude oil produced by Supven and Monven into its tankers at Venezuelan ports and then shipped it to Interamerican.

13. The first shipment originated with Monven, the last two with Supven.

Foreign oil concerns doing business in Venezuela hold their concessions subject to regulation by the government's Ministry of Mines and Hydrocarbons. This ministry supervises and reviews the sales policies of concessionaries and promulgates rules governing the sale of oil produced in Venezuela.[14] Among the sanctions imposed for violating these rules is the suspension of the right to ship oil out of Venezuela.[15] Pursuant to this authority, after the first shipments to Interamerican, Supven and Monven were called before the Ministry and were instructed that no more Venezuelan oil was to reach Interamerican. The reasons behind these instructions were mixed. They apparently stemmed partly from the personal animosity that certain high Venezuelan Government officials felt toward the chief shareholders of Interamerican[16] and partly from an attempt by the ministry to effectuate certain Venezuelan economic policy objectives.[17]

After receipt of these instructions, Amoco informed Interamerican that it could no longer supply it with Venezuelan crude oil, since the Venezuelan Government had forbidden either direct or indirect sales to Interamerican. In fact, all of the defendants refused to sell Venezuelan crude to Interamerican unless the Venezuelan Government would lift the ban. As a result of these refusals to deal, Interamerican brought a treble-damage action under section 4 of the Clayton antitrust law[18] claiming that defendants were engaging in an unlawful concerted refusal to deal.[19]

B. *Prior Cases*

The defendants did not deny the charge that they had concertedly refused to deal with Interamerican. Rather, they argued that foreign governmental compulsion is a complete defense to an antitrust action based on such a charge.[20] Chief Judge Caleb Wright of the United States District Court for the District of Delaware agreed. Finding that the defendants had been compelled to engage in a concerted refusal to deal by the Venezuelan Government, he held that "a

14. 307 F. Supp. at 1294.

15. 307 F. Supp. at 1294.

16. 307 F. Supp. at 1295-96. *See* text following note 9 *supra.*

17. The two principal economic policy objectives of the Venezuelan Government appeared to be a desire to keep Venezuelan crude oil from going to "unnatural" markets such as Canada and Europe, and a fear of allowing crude oil to go to a bonded refinery, such as Interamerican's, because of the low price at which such oil could be sold on the international market. 307 F. Supp. at 1294-95.

18. 15 U.S.C. § 15 (1964). *See* note 7 *supra.*

19. A concerted refusal to deal occurs when a group of traders agree to boycott—not deal with—another trader. *See, e.g.,* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

20. Joint Brief for Defendants at 50-52, Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

showing of bona fide compulsion by a foreign government immunizes an otherwise illegal boycott."[21]

As Chief Judge Wright acknowledged, *Interamerican* presented a case of first impression. There is no statutory authority providing for the defense of sovereign compulsion, and there are no prior reported American cases specifically holding that the defense is an appropriate one. The court did, however, find relevant dicta in the cases of *Continental Ore Company v. Union Carbide & Carbon Corporation*[22] and *United States v. Watchmakers of Switzerland Information Center, Incorporated* (*Swiss Watch*).[23]

The *Continental Ore* case involved a charge that Union Carbide had conspired with one of its subsidiaries, Electro Metallurgical Company of Canada, Ltd. (Electro Met), to monopolize vanadium production and sales in Canada.[24] Electro Met had been appointed by the Canadian Government to be its exclusive purchasing agent of vanadium. The United States Supreme Court, per Justice White, held that Electro Met was not excused from refusing to deal with Continental Ore, an American corporation that sold vanadium, simply because it was "acting in a manner permitted by Canadian law."[25] The Court, however, seemed to qualify its holding by observing that there was "no indication that the Controller or any other [Canadian] official . . . directed that purchases from Continental be stopped."[26] Commentators have read this statement as implying that if the Canadian Government actually had made such a direction, the Court would have reached a different result.[27]

In the *Swiss Watch* case, Swiss and American makers and sellers of watches and watch parts were charged with a conspiracy to restrain United States commerce in watches.[28] The heart of the conspiracy was the Collective Convention, a private agreement among associations of Swiss manufacturers and some individual American manufacturers. One of the designs of the Convention was to regulate the flow of Swiss watch parts to American watchmakers with the intended purpose of suppressing the American watch industry. The District Court for the Southern District of New York found that this in-

21. 307 F. Supp. at 1297 n.14.

22. 370 U.S. 690 (1962). *See* note 1 *supra.*

23. 1963 Trade Cas. 77,414 (S.D.N.Y. 1962).

24. Vanadium is a rare metal used in producing vanadium steel—a tough and durable steel.

25. 370 U.S. at 706-07.

26. 370 U.S. at 706.

27. *See, e.g.*, Barnard, *Extra-Territoriality and Anti-Trust Law in the United States*, 6 SUPP. INTL. & COMP. L.Q. 95, 104 (1963); Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925, 934 (1962); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INTL. L. 100, 136-37 (1967).

28. 1963 Trade Cas. at 77,416.

tended purpose was in fact effectuated by the curtailment of watch parts exported from Switzerland to the United States.[29] The court recognized that the Swiss watch industry was heavily regulated by the Swiss Government and that the Collective Convention was encouraged by that government. However, the court emphasized that participation in the Collective Convention was not required by Swiss law.[30] As a result, the defendants were held liable for participating in the privately agreed-upon restrictive practices, even though such practices were permitted under Swiss law.[31] Significantly, the opinion by Judge Cashin distinguished this case from the situation where a foreign government compels businesses to engage in activities that violate American antitrust laws: "If, of course, the defendant's activities had been required by Swiss law, this court could indeed do nothing."[32]

C. *Justification for the Sovereign Compulsion Defense*

In the *Interamerican* case, Chief Judge Wright declined to base his holding that a sovereign compulsion defense was appropriately raised solely on the precedential authority of the dicta in these two earlier cases. He also emphasized that two basic policy concerns dictated recognizing this defense: fairness to the coerced businessman and intergovernmental comity.

When an American business abroad is ordered by the foreign country in which it is operating to do an act that violates American antitrust laws, that business is confronted with a harsh dilemma. If it does not comply, it may well be forced to end its operations in the foreign country and thereby sustain great financial loss. On the other hand, if it does comply, it could be faced with a crippling treble-damage action in an American federal court. The district court in *Interamerican* recognized the need for resolving such a dilemma. A desire to resolve the conflict appeared to be the motivating force behind the court's decision to adopt the concept of sovereign compulsion.[33]

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29. 1963 Trade Cas. at 77,424.

30. 1963 Trade Cas. at 77,426. Although adherence to the Convention was not required by the Swiss Government, that government played a very substantial role in the conduct of the Swiss watch industry. The great interest taken by the Swiss Government in the industry and in this suit exemplifies the importance of conflicts that can arise between the United States antitrust system and foreign systems of government-supported or government-compelled private regulation. For a thorough discussion of the *Swiss Watch* case, see 4 BUSINESS REGULATION IN THE COMMON MARKET NATIONS: COMMON MARKET AND AMERICAN ANTITRUST ch. 6 (J. Rahl ed. 1970) [hereinafter J. Rahl].

31. 1963 Trade Cas. at 77,456.

32. 1963 Trade Cas. at 77,456.

33. Chief Judge Wright, in his opinion, enunciated his concern in these terms:

> Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact

As has been noted, this court was not the first to indicate concern for the plight of American businesses abroad that find themselves caught in conflicts between American antitrust law and the laws of foreign states. The Supreme Court in *Continental Ore,* as well as the district court in *Swiss Watch,* indicated in dicta that governmental compulsion should immunize the business involved from antitrust liability.[34] Similarly, American courts, in fashioning consent decrees and other forms of equitable relief, have in a number of instances exhibited considerable caution in requiring extraterritorial compliance. In some cases, the courts have provided that the coerced party may be excused from compliance with decrees when such compliance would require contravention of a foreign country's law within that country's territory.[35] Furthermore, in the procedural area of discovery, the Supreme Court has excused nonproduction of documents by a party to a suit when such documents are located in a foreign country and their production is barred by the laws of that country.[36] Thus, the *Interamerican* court's policy objective of fairly

business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.
307 F. Supp. at 1298.

34. *See* text accompanying notes 22-32 *supra.*

35. *See, e.g.,* United States v. American Type Founders Co., 1958 Trade Cas. 74,203, 74,207 (S.D.N.Y. 1958) (exception for "any act in a foreign nation in violation of any law . . . of said foreign nation"); United States v. United Fruit Co., 1958 Trade Cas. 73,790, 73,801 (E.D. La. 1958) (exception "if such action is required by the Government of the country in which the act takes place"); United States v. American Smelting & Ref. Co., 1957 Trade Cas. 73,798, 73,402 (S.D.N.Y. 1957) (exception for "any act in a foreign country . . . required of defendant . . . by the government thereof"); United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1953) (exception "for doing anything outside of the United States which is required . . . under the laws of the government . . . in which Philips . . . may be incorporated, chartered or organized or . . . doing business"); United States v. Imperial Chem. Indus., Ltd., Civil No. 24-13 (S.D.N.Y. July 30, 1952) (Final Judgment), cited in Fugate, *supra* note 27, at 934 n.44, court's opinion at 105 F. Supp. 215 (S.D.N.Y. 1952) (exception to the injunction against the British defendant for acts "in compliance with any law of . . . any government or instrumentality thereof, to which ICI is at the time being subject, and concerning matters over which, under the laws of the United States, such foreign government has jurisdiction").

It should be noted that such deference by the courts has undergone a change in rationale. In the early cases, the courts felt that American law dictated that one nation could not order conduct to be carried on in another nation unless that conduct was legal in the other nation. *See* United States v. General Elec. Co., 115 F. Supp. 835 (D.N.J. 1953); RESTATEMENT OF CONFLICT OF LAWS § 94 (1934). Recently, however, American authorities have adopted the view that American courts have the power to order conduct abroad even if it is illegal in the foreign country. *See, e.g.,* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 39 (1965). Although the courts have recognized such power, they have refrained from employing it, in an attempt to avoid placing parties in positions in which they must violate foreign laws. *See* Societe Internationale v. Rogers, 357 U.S. 197 (1958). *See generally* J. Rahl, *supra* note 30, at 118-20.

36. Societe Internationale v. Rogers, 357 U.S. 197 (1958). In this case, the Supreme Court held: "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws

treating businessmen caught between conflicting laws of different sovereigns reflects a policy that has long been articulated and implemented by the federal courts.

In addition to this sound policy objective, the court in *Interamerican* rested its decision on an ambiguously expressed desire to foster and maintain international comity. The opinion contains an undertone of concern that a judgment against the defendants could be construed as a judgment against the foreign sovereign. The court clearly wanted to avoid the potentially troublesome ramifications of such an interpretation. Accordingly, the court simply considered the acts of the defendants to be the acts of the foreign sovereign itself:

> It requires no precedent, however, to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms then have no choice but to obey. Acts of business become effectively acts of the sovereign.[37]

Although Chief Judge Wright neglected, perhaps intentionally, to set forth the theoretical or doctrinal basis for this concept,[38] the

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preventing compliance are those of a foreign sovereign." 357 U.S. at 211. The Court went on to hold that the petitioner was excused from compliance with the pretrial production order because the laws of Switzerland preventing disclosure made such compliance impossible.

37. 307 F. Supp. at 1298. Many legal writers have accepted this concept of considering the acts of the companies involved as having effectively become those of the foreign government and have expressed the opinion that acts ordered by a foreign government should be exempt from enforcement of American antitrust laws. *See* ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 83 (1955) [hereinafter ATTORNEY GENERAL'S REPORT]; K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 92-93 (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 148 (1958); H. KRONSTEIN, J. MILLER & I. SCHWARTZ, MODERN AMERICAN ANTITRUST LAW 267 (1958); J. Rahl, *supra* note 30, at 238; Timberg, *United States and Foreign Antitrust Laws Governing International Business Transactions*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 619, 624 (Surrey & Shaw ed. 1963); Barnard, *supra* note 27, at 103; Celler, *A Congressman's View of Foreign Commerce Aspects of the Sherman Act*, 27 A.B.A. ANTITRUST SECTION 3 (1965); Graziano, *supra* note 27, at 116.

38. To support the proposition that the acts of the defendants effectively become the acts of the foreign sovereign, some legal writers have cited the famous case of American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *See* W. FUGATE, *supra* note 37, at 148; J. Rahl, *supra* note 30, at 238. However, reliance upon *American Banana* to support a sovereign compulsion defense seems very questionable.

The *American Banana* case involved the occupation of plaintiff's property in Panama by actual agents of the Costa Rican Government. The plaintiff had brought suit alleging defendant's liability for having instigated the occupation. Under these circumstances, and under a territorially based jurisdiction concept, the Supreme Court held that the defendant could not be held liable for acts actually carried out by a foreign government. 213 U.S. at 357-58.

The jurisdiction concept of territoriality used by the Court in *American Banana*, which provides that acts done in a foreign country must be judged by the law of that foreign country, 213 U.S. at 356, although never expressly overruled, has been consistently overlooked by the Court in later decisions involving the extraterritorial application of American antitrust laws. *See, e.g.*, Continental Ore Co. v. Union Carbide &

equation of the corporations and the foreign government did provide one springboard for his decision to immunize the defendants' activities. He reasoned that the compelled acts of the defendants are to be treated the same as if they had been acts of the foreign sovereign and that either (1) acts of foreign sovereigns are not within the jurisdiction of the Sherman Act or (2) even if American courts do have jurisdiction, they cannot inquire into the validity or legality of the acts of the foreign sovereign.[39] In order to support its proposition that the Sherman Act does not confer jurisdiction over the acts of a foreign sovereign, the district court sought to analogize the sovereign compulsion question with the doctrine of *Parker v. Brown*.[40]

The *Parker* case involved a program authorized by the California Agricultural Prorate Act,[41] an act that provided for the adoption of joint marketing plans regulating the sale of raisins. Private producers of raisins devised these plans, and the practical control actually exercised by the state was limited to a veto power occasionally utilized by the state Director of Agriculture. The Supreme Court agreed that the scheme resulted in restricted competition in the marketing of raisins.[42] It was quite clear that had the producers agreed upon the scheme privately and had no state action been involved, the marketing plans would have constituted a combination in restraint of trade in violation of the Sherman Act. However, the Supreme Court held that anticompetitive actions by private producers that resulted from compliance with a state regulatory program were not the subject of antitrust liability.[43] The Court stated that "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official

Carbon Corp., 370 U.S. 690 (1962); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. American Tobacco Co., 221 U.S. 106 (1911).

Moreover, the *American Banana* opinion contains no language that would control the sovereign compulsion problem. The Court limited its decision to ruling upon acts actually carried out by the foreign sovereign and did not encompass the separable problem of acts compelled by the sovereign but carried out by private business. As a result, it would seem that the only continuing validity of *American Banana* is its availability to the Court as a building block should the Court decide to hold that American courts do not have jurisdiction over sovereign compulsion disputes. In so holding, however, the Court would need to revert to the territorial approach of jurisdiction and somehow distinguish the sovereign compulsion situation from all other antitrust settings involved in cases decided since *American Tobacco*, which ignored the *American Banana* holding, that reject such an approach. Such a course by the Court seems at best unlikely.

39. 307 F. Supp. at 1298-99.

40. 317 U.S. 341 (1943). This case was noted by Chief Judge Wright at 307 F. Supp. at 1298 n.18.

41. Act of June 5, 1933, ch. 754, [1933] Statutes of California, *as amended* CAL. AGRIC. CODE § 59501 (West 1968).

42. 317 U.S. at 352.

43. 317 U.S. at 352.

action directed by a state."[44] The Court thought that in the absence of such mention congressional intent to interfere with the "sovereignty" of the state was not "lightly to be attributed."[45]

Such a policy of solicitude for governmental sovereignty might be applied in the *Interamerican* context. But, although both *Interamerican* and *Parker v. Brown* obviously involved the influence and effects of governmental action, the analogy between the two cases is otherwise forced. *Parker v. Brown* stands for the limited proposition that a state government, which is a constituent part of the American federal scheme, enjoys immunity from the federal antitrust laws and that it may extend this immunity to companies operating under its established program.[46] It is not at all the same to say that a foreign government, which is not subordinate to the Constitution of the United States and which may harbor values alien to traditionally accepted American values, can similarly order the laws of the United States to be violated with impunity.[47] As a result, although *Parker v. Brown* has certain factual similarities to *Interamerican*, it is by no means sufficient authority in itself for the broad construction of the scope of the defense of sovereign compulsion announced by the district court in *Interamerican.*

Foreseeing the possible inapplicability of the *Parker v. Brown* doctrine, the court in *Interamerican* also asserted that even if it had jurisdiction over the foreign sovereign's acts, the act-of-state doctrine prevented it from inquiring into the legality of those acts.[48] Although an act-of-state situation does present striking similarities to a sovereign compulsion setting, it is questionable whether the act-of-state doctrine provides controlling authority for the latter situation. The act-of-state doctrine can be traced to the case of *Underhill v.*

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44. 317 U.S. at 351.

45. 317 U.S. at 351.

46. 317 U.S. at 351-52.

47. An analogous situation is present in the area of vertical resale price maintenance agreements. Such agreements are generally illegal per se under American antitrust laws. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); ATTORNEY GENERAL'S REPORT, *supra* note 37, at 150. However, the McGuire Amendment of 1952, Act of July 14, 1952, ch. 745, § 2, 66 Stat. 631, adding §§ 5(a)(2)-(5) to the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(2)-(5) (1964), provides some exemption for such agreements when they are legal under the "fair-trade" laws of any "State, Territory, or the District of Columbia." 15 U.S.C. § 45(a)(2) (1964). The question has been raised whether fair-trade laws passed by foreign governments would also enjoy immunity from the federal antitrust laws. It has been convincingly argued that Congress intended to allow only states in the United States to develop their own policies free from federal interference and that it did not intend to give such discretion to foreign governments. *See* J. Rahl, *supra* note 30, at 205-06. The same rationale is applicable to *Parker v. Brown* since Congress intended neither to control the activities of a state under the Sherman Act nor to give foreign nations complete discretion over the applicability of the Sherman Act to American foreign commerce.

48. 307 F. Supp. at 1298-99.

Hernandez,[49] in which Chief Justice Fuller explained the doctrine in the following terms: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[50] This deference to the acts of foreign sovereign states is based upon a realization that the cause of international harmony would not be well served by subjecting the acts of a foreign sovereign to judicial scrutiny by American courts[51] and, concurrently, upon the proper separation of powers within the American federal government.[52] Since *Underhill*, the courts have consistently refused to examine the legality or propriety of acts carried out by a foreign sovereign within its own territory.[53]

As evidenced by the *Interamerican* court's willingness to invoke the act-of-state doctrine, the parallels are obvious between a situation such as that in *Interamerican* and that in which the doctrine is properly applied. But the act-of-state doctrine is not controlling in the *Interamerican* situation, principally because the sovereign compulsion defense is not concerned with the validity or legality of the foreign government's order. Rather, its concern is centered upon determinations whether the American business was in fact ordered to act in a manner violative of American antitrust laws and whether it complied with that order. This concern is separate and distinct from the concern of the act-of-state doctrine since the sovereign compulsion defense does not involve an inquiry into the propriety of the foreign government's act. Thus, the basic equation adopted by the court in *Interamerican* that the acts of the defendants are the same as the acts of the foreign government does not require a grant of immunity from American antitrust laws for the defendants, and is in itself inappropriate to a sovereign compulsion question.[54]

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49. 168 U.S. 250 (1897).

50. 168 U. S. at 252. For a general discussion of the act-of-state doctrine, see METZGER, *Act of State Doctrine Refined: The Sabbatino Case*, 1964 SUP. CT. REV. 223; van Panhuys, *In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities*, 13 INTL. & COMP. L.Q. 1193 (1964); Zander, *The Act of State Doctrine*, 53 AM. J. INTL. L. 826 (1959).

51. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918), in which the Supreme Court stated that judicial review of another country's sovereign acts "would very certainly imperil the amicable relations between governments and vex the peace of nations."

52. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964), a case involving the expropriation of American property by the Cuban Government, the Supreme Court declared that the act-of-state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers." The Court went on to express concern that judicial review of foreign acts might hinder the progress of American foreign policy.

53. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). *See also* references cited in note 50 *supra*.

54. Another international-law doctrine that provides some parallel considerations with sovereign compulsion is that of sovereign immunity. This doctrine is essentially

Nevertheless, concepts of international comity do provide general policy objectives—such as judicial reluctance to interfere with internal affairs of foreign sovereigns and judicial deference to the execu-

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a procedural concept protecting foreign states from suit in American courts. The origin of this doctrine is generally traced to the case of Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812). That case involved a vessel expropriated by the French Government and converted into a warship. While docked at an American port, the ship was libeled by its former owners. The Attorney General, acting on behalf of the State Department, suggested to the Court that the ship be held immune from suit. The Court specifically recognized that it had territorial supremacy and jurisdiction, but it declined to adjudicate the merits of the case by holding that the warship was immune from suit:

> [O]ne sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

11 U.S. (7 Cranch) at 137. The overriding concern with maintaining amicable international relations can easily be seen in this formulation of the doctrine. But the doctrine is also based on the desire of American courts to defer to the executive branch of government for the conduct of foreign affairs. *See, e.g.*, National City Bank v. Republic of China, 348 U.S. 356, 361 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (in which the Court stated that the courts will follow whatever determination the executive makes concerning whether immunity should be applied); *Ex parte* Peru, 318 U.S. 578, 588 (1943).

Official representatives and governmental agencies of foreign governments have been consistently recognized as integral parts of their governments and are thereby also eligible for immunity. *See, e.g.*, National City Bank v. Republic of China, 348 U.S. 356, 358 (1955). However, the availability of the doctrine of sovereign immunity for agents of foreign states has been considerably narrowed in the United States with the adoption by the State Department of the "restrictive theory" of sovereign immunity. This restrictive theory became the general policy of the State Department in 1952 with the writing of what has been termed the Tate Letter. This letter stated in part:

> According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Letter of Jack B. Tate, Acting Legal Advisor to the Dept. of State, May 19, 1952, in 26 DEPT. STATE BULL. 984, 985 (1952).

Sovereign compulsion could be analogized to the sovereign immunity doctrine by considering the defendant to be effectively the agent of the foreign sovereign. However, although inquiry by an American court in a sovereign compulsion case could produce the same international friction that sovereign immunity was designed to prevent, principles of sovereign immunity do not control a sovereign compulsion question. In the first place, it is doubtful that the defendant's acts would qualify for the *jure imperii* requirement. But, more important, the action in a sovereign compulsion case is not against the foreign government, and the defendant cannot properly be considered its agent. To find such agency in the typical sovereign compulsion case would mean that every firm or individual that complies with a law or governmental order is an agent of the government. Such an assumption amounts to a shallow and unnecessary legal fiction.

For a general discussion of the restrictive theory of sovereign immunity, see T. GIUTARRI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY (1970); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INTL. L. 93 (1953); Collins, *The Effectiveness of the Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. OF TRANSNATL. L. 119 (1965); Lauterpacht, *Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INTL. L. 220 (1951).

tive branch in matters of foreign affairs—that a court may properly consider in deciding whether to hold a business under sovereign compulsion liable for antitrust violations. Moreover, it has previously been observed that notions of fairness suggest that it is unduly harsh to penalize a firm under American law for complying with the laws of a foreign nation.[55] Thus, the *Interamerican* court was probably correct in concluding that sovereign compulsion should be available as a defense—at least in some circumstances. The court's inability to articulate a clear theoretical foundation for the doctrine of sovereign compulsion may perhaps be excused by the doctrine's newness and uniqueness.

II. Implications of the Interamerican Doctrine

Even if the sovereign compulsion defense is desirable from the standpoints of fairness and international comity, the question remains whether the defense, as formulated in *Interamerican*, is consistent with the basic policy objectives of the federal antitrust laws. The Sherman Act extends its guarantees of free competition, not merely to commerce among the several states, but to commerce with foreign nations as well.[56] What, then, are the effects on free competition of the activity that the doctrine of the *Interamerican* case seems to encourage?

A. *Effects on American Policy*

Absent the defense of sovereign compulsion, the defendants undoubtedly were guilty of a per se violation of the Sherman Act by engaging in a concerted refusal to deal.[57] The court, however, held that under the circumstances it would be unfair to subject the defendants to antitrust liability.[58] Normally, courts do not engage in inquiries into the reasonableness of or possible justifications for per se offenses. As Justice Douglas wrote in *United States v. Socony-Vacuum Oil Company*[59] regarding another per se offense:

> Whatever economic justification particular price fixing agreements may be thought to have, the law does not permit an inquiry into

55. *See* notes 33-36 *supra* and accompanying text.

56. *See* note 6 *supra*.

57. The same type of concerted refusal to deal found in the *Interamerican* case has consistently been held by the courts to be unreasonable per se and therefore violative of the Sherman Act. *See, e.g.*, Radiant Burners v. People's Gas Light & Coke Co., 364 U.S. 656 (1960); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959); Fashion Originator's Guild v. FTC, 312 U.S. 457, 467-68 (1941); Silver v. New York Stock Exch., 196 F. Supp. 209, 222 (S.D.N.Y. 1961), *affd.*, 373 U.S. 341, 347 (1963).

58. 307 F. Supp. at 1298.

59. 310 U.S. 150 (1940).

> their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.[60]

This refusal to consider economic justifications has consistently been applied in other cases involving per se offenses, including concerted refusals to deal.[61] The concerted refusal to deal involved in *Interamerican*, however, was excused on the grounds of sovereign compulsion. Thus, whether or not one agrees with the seeming fairness of the result reached in *Interamerican*, it should be emphasized that the newly promulgated doctrine of sovereign compulsion provides an escape route from per se violations of the antitrust acts and therefore presents a potential for wide-ranging complications.

A second problem revolves around the large amount of discretion that the court in *Interamerican* has vested in foreign governments: once a foreign government has acted, an American court is apparently precluded from enforcing the antitrust laws. After the defendant has shown that his conduct was ordered or directed by a foreign government, he need merely assert the defense of sovereign compulsion in order to escape antitrust liability. Such automatic termination of antitrust suits could easily have serious consequences on commerce and foreign affairs since the result would apparently be the same no matter how substantial the impact of the violation on either the commerce or the foreign policy of the United States. It may be questioned whether the *Interamerican* approach would be followed if the Italian Government were to order General Electric and Westinghouse to merge their Italian operations and fix prices as a condition to their doing business in Italy. Or, to suggest a more likely possibility, what if an Arab government were to direct all American businesses in its country to refuse to deal either directly or indirectly with Israeli- or Jewish-controlled firms? Under the *Interamerican* approach, courts faced with situations such as these would have to determine whether the American businesses were actually compelled to act by the foreign governments involved. If so, a court would be barred from considering the matter further.

A third and related problem under the *Interamerican* theory of sovereign compulsion is that the purposes of the foreign government in ordering a business to act in certain matters have no bearing on the question of liability for activities violative of American antitrust laws. In *Interamerican*, for example, Venezuela was motivated both by a desire to keep its oil from going to a bonded refinery because of the low price at which such oil could be resold and a policy of preventing its oil from going to what it considered to be unnatural

60. 310 U.S. at 224 n.59.

61. The same policy of rejecting economic justifications for per se violations was applied to foreign commerce in the case of Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951).

markets such as Canada or Europe.[62] These factors indicated a policy on Venezuela's part to attempt to cartelize the international market for crude oil. Such a policy is totally inconsistent with the American policy against restraints on free competition. However, this policy conflict was not considered by the court in deciding whether the sovereign compulsion defense should be applied. By not permitting courts to consider the purposes behind a foreign sovereign's order, the *Interamerican* approach would apparently leave an American business free to participate in a foreign plan that is contrary to American policy and interests so long as the firm was ordered to do so by the foreign government involved.

A fourth major problem raised by the *Interamerican* case is the question of the applicability of the sovereign compulsion defense to activities that are compelled by a foreign sovereign but carried on outside that sovereign's territory. Such a situation was presented in the *Interamerican* case. The Venezuelan Government ordered that *all* oil shipments to Interamerican, direct or *indirect*, be stopped. Amoco, a company that was not doing business in Venezuela, responded to this order and refused to deal with Interamerican. This company, as well as the companies actually doing business in Venezuela, was immunized from liability by the sovereign compulsion defense.[63]

As has been noted,[64] *Interamerican* was a case of first impression, and there was no precedential or statutory basis for allowing the defense of sovereign compulsion. However, the problem had been anticipated by legal scholars,[65] some of whom were cited in Chief Judge Wright's opinion.[66] While these authorities support the basic concept of a defense of sovereign compulsion, all of them—unlike the district court in *Interamerican*—would limit such immunity to activities conducted within the foreign sovereign's territory.[67]

It is uncertain what the *Interamerican* court's policy justification was for its broad application of the sovereign compulsion defense. It is, however, clear that by thus broadening the defense its potential for misuse was greatly expanded. Would it now be permissible for Ford and General Motors to merge their entire foreign divisions because the government of Nicaragua so ordered? Or would a

62. *See* note 17 *supra*.

63. 307 F. Supp. at 1304.

64. *See* text preceding note 22 *supra*.

65. Many legal writers have expressed the opinion that acts ordered by a foreign government should be exempted from the enforcement of American antitrust laws. *See* note 37 *supra*.

66. 307 F. Supp. at 1298 nn.18, 19, citing ATTORNEY GENERAL'S REPORT, *supra* note 37; K. BREWSTER, *supra* note 37; W. FUGATE, *supra* note 37; Fugate, *supra* note 27.

67. *See, e.g.*, ATTORNEY GENERAL'S REPORT, *supra* note 37, at 83; W. FUGATE, *supra* note 37, at 148; Fugate, *supra* note 27, at 932.

Turkish order that instructed American tobacco buyers who purchase tobacco in Turkey to refuse to purchase tobacco from American growers be recognized as a valid antitrust defense? The answers to these questions would apparently be in the affirmative since the only relevant concern of the *Interamerican* sovereign compulsion test is whether the foreign government actually ordered the activity involved.

B. *Effects on the Parties*

The foregoing discussion demonstrates the very substantial costs to American foreign and economic policy that automatic deference to the demands of a foreign state may entail. The *Interamerican* formulation of the sovereign compulsion defense also has implications for the parties involved in antitrust suits. These implications revolve around statutory and judicial efforts to treat businesses fairly.

It is disturbing to a sense of fairness to force a business to choose between discontinuing its trade in a foreign country and facing treble-damage antitrust liability at home.[68] While American courts apparently had not directly considered the question of compulsion by a foreign sovereign in civil cases previous to *Interamerican,* similar considerations of fairness had been raised in the criminal setting in the treason cases that followed the Second World War.

In the leading case in this area, *Kawakita v. United States,*[69] the petitioner was both a natural-born citizen of the United States and a Japanese national by virtue of his parentage and of Japanese law. He had been prevented from returning to the United States after a visit to Japan by the outbreak of the war. During his forced stay, however, he demonstrated considerable sympathy with the Japanese cause through his work in a private corporation that produced war materials. During the course of this work, the petitioner apparently engaged in brutal abuse of American prisoners of war who were forced to labor at the factory where he was employed. Following the war, he reasserted his American citizenship and came back to the United States, where he was subsequently convicted of treason. In affirming the conviction, the Supreme Court was careful to point out that only acts done voluntarily or wilfully by the petitioner could be held treasonable.[70] The Court stated that had the acts been "done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense."[71] This

68. *See* notes 33-36 *supra* and accompanying text.

69. 343 U.S. 717 (1952).

70. 343 U.S. at 735.

71. 343 U.S. at 735.

distinction between compelled and voluntary acts had previously been recognized by the lower federal courts[72] and in other common-law jurisdictions.[73]

An analogy can be drawn between criminal cases like *Kawakita* and the civil antitrust case involved in *Interamerican*. Both situations involved acts committed abroad that contravened American law. The treason cases recognized that Americans should not be subjected to criminal punishment for compelled acts. The reasoning behind the dicta in those cases appears to have been that the defendant could not have had the requisite intent to commit treason if he had been compelled to act and that it would be unfair to require so harsh a choice as death or treason.[74] The sovereign compulsion defense in civil antitrust cases involves some similar policy considerations.

The analogy between treason and antitrust cases with regard to the sovereign compulsion defense is nevertheless imperfect in at least one important respect. The law of treason, like most criminal law, is principally designed to protect the interests of society as a whole.[75] By saying that it is "fair" not to punish a defendant accused of treason, one is merely saying that the societal welfare does not require his punishment under the circumstances. However, different concerns are present in the ordinary civil action—in such actions it is clearly a goal of the law to compensate the victim for the harm he has suffered.[76] Yet, it can be argued that the antitrust laws are at least somewhat analogous to criminal actions. The desire to protect the societal goal of free competition,[77] the punitive nature of treble damages,[78] and the occasional exercise of traditional criminal sanctions[79] all lend support to such an argument. But the antitrust laws also have strong characteristics of civil or private law since they create private causes of action.[80] As a result, the individual victim of anticompetitive conduct, as well as society at large, has a broad right to protection against such activities. Thus, even if society is willing to sacrifice its

72. *See* Gillars v. United States, 182 F.2d 962, 974-76 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921, 945 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

73. *See, e.g.*, Rex v. Neumann, [1949] 3 S. AFR. L.R. 1238, 1268, 44 A.J. 423, 453.

74. *See generally* Westbrook, *The Mental Element as a Limitation on the Law of Treason*, 68 DICK. L. REV. 1, 17 (1963).

75. R. PERKINS, CRIMINAL LAW 4 (1969); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 7 (3d ed. 1964).

76. W. PROSSER, *supra* note 75, at 7.

77. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 274 (1927).

78. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960), in which the court of appeals expressly characterized the treble-damage award as a "rigorous penalty."

79. Criminal sanctions are provided for antitrust enforcement in § 1 of the Sherman Act, 15 U.S.C. § 1 (1964).

80. *See* note 7 *supra*.

general interest in free competition in order to treat American businesses abroad fairly, the victims of what would normally be unlawful activity under the antitrust laws may not be willing to forego their rights to redress. In other words, concepts of fairness toward businessmen facing conflicting laws of two sovereigns must be balanced against concepts of fairness toward victims of anticompetitive activity.

III. A Suggested Formulation for the Defense of Sovereign Compulsion

The court in *Interamerican* was concerned with furthering two basic policy goals—intergovernmental comity and fairness to the coerced businessman. It has been suggested in this Note that the approach adopted by the court accepts intergovernmental comity at heavy expense to basic American interests.[81] It has also been suggested that the abstract ideal of fairness will not always be served by holding the violator of the antitrust laws blameless.[82] It is therefore submitted that in the area of sovereign compulsion, as in so many other areas of the law, the public welfare is not best served by the automatic application of a hard and fast rule. Rather, the courts should adopt a more flexible approach—one that aims at a just result by balancing the equities of the particular situation with which it is confronted.

The *Restatement (Second) of Foreign Relations*[83] appears to advocate the adoption of such a balancing approach. Recognizing that under international law two sovereigns having concurrent jurisdiction over the same businessman may simultaneously subject him to conflicting demands,[84] the *Restatement* suggests that each sovereign should weigh several factors before requiring compliance with its own law. Among the moderating factors suggested by the *Restatement* are the national interests of each state, the nature of the hardship on the businessman, and the territorial impact of the required conduct.[85] Examination of such factors and others would

81. *See* pt. II. A. *supra.*

82. *See* pt. II. B. *supra.*

83. Restatement (Second) of Foreign Relations § 40 (1965). *See* note 85 *infra.*

84. It should be recognized that a determination of which sovereign should make demands upon a business when more than one sovereign has jurisdiction involves a discussion of principles of conflict of laws. *See* note 85 *infra.* However, this discussion of § 40 of the *Restatement,* which adopts a conflict-of-laws approach, will proceed no farther than an analogy to factors a court should review when considering a sovereign compulsion defense. The reason for this limitation is that the scope of this Note prevents a thorough discussion of the conflicts approach. For a general discussion of the application of conflict-of-laws principles to extraterritorial enforcement of American antitrust law, see Comment, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach,* 70 Yale L.J. 259 (1960).

85. The full text of the section provides:

introduce much-needed flexibility into the consideration of a claimed sovereign compulsion defense.

The implementation of a balancing approach to the sovereign compulsion situation involves a marked divergence from the legal concepts normally applied by the courts in antitrust actions. Although this divergence might seem "radical" at first glance, it is necessary to keep in mind the narrow and unique factual setting of a sovereign compulsion situation—that of a business abroad being compelled by a foreign government to engage in activities violative of American antitrust laws.

This divergence from traditional analysis that is caused by the doctrine of sovereign compulsion involves the introduction of a new consideration into antitrust actions. Although the sovereign compulsion defense does not change or replace ordinary antitrust considerations, it adds a new and independent question for the court to decide. Since the defense is intended to resolve both problems of international comity and the dilemma facing businessmen abroad, the inquiry undertaken in order to ascertain whether it will apply will not be similar to the "rule of reason" inquiry of traditional antitrust law, which seeks to determine whether particular behavior involves an unreasonable restraint of trade.[86] Hence, the sovereign compulsion defense requires a broad "reasonableness inquiry" that focuses upon principles of international law and traditional equity rather than on the restraint of trade alone. A sound approach must allow the court the flexibility required in order adequately to review several important factors that may influence the unique sovereign compulsion setting.

One major factor that must be considered by a court using this balancing approach is the kind of impact the compelled activity may have upon American foreign policy. This question attains importance because a case involving foreign governmental action may

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§ 40. Limitations on Exercise of Enforcement Jurisdiction.
Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 40 (1965).

86. The rule-of-reason inquiry was initially adopted by the Supreme Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911), in which the Court ruled that only unreasonable or undue restraints of trade were meant to be included in the Sherman Act.

easily entail ramifications in the area of foreign relations and upset the desire for international comity. It may be argued that determinations of this nature are not appropriately made in a judicial forum. However, the policy considerations involved in applying the defense of sovereign compulsion parallel problems found in the application of the doctrines of sovereign immunity[87] and act of state.[88] In applying each of these doctrines, courts are called upon to consider the possible impact of an activity or circumstance upon American foreign relations. In such situations, the courts have traditionally deferred to any pronouncements made by the executive branch of government that serve to define the position of American foreign policy.[89] Absent any such definitive statement by the executive branch, however, the courts have considered themselves free to make their own determinations whether a defendant's conduct represents a serious breach of the nation's foreign policy.[90] The advantage of a court being able to weigh these foreign-policy ramifications was exemplified by the somewhat emotive hypothetical case raised above[91] concerning an order by an Arab nation instructing American businesses operating within its territory to discontinue sales to firms with Israeli or Jewish backing. Considerations of public policy in this case could be weighed by a court adopting a balancing approach but would probably be irrelevant under the *Interamerican* approach, which inquires only whether foreign governmental compulsion actually existed.

A second factor that a court should consider when ruling on a sovereign compulsion plea is the scope of the foreign government's directive. In the *Interamerican* case, Chief Judge Wright allowed Amoco to claim the defense and thereby immunized its refusal to deal even though it was not actually doing business in Venezuela.[92]

87. *See, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945) (involving the libeling by an American of a ship owned by Mexico); *Ex parte* Peru, 318 U.S. 578 (1943) (involving the libeling by a Cuban corporation of a ship owned by Peru). *See also* note 54 *supra*.

88. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (involving the expropriation by Fidel Castro's Cuban Government of property owned by American citizens). *See also* notes 48-53 *supra* and accompanying text.

89. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420, 436 (1964) (implying that the Court would continue to defer to the executive branch's expressed will in order to avoid possible inconsistent results and embarrassment to the executive branch in its conduct of foreign affairs); Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow . . . .").

90. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420 (1964) (determining the applicability of the act-of-state doctrine when the State Department had failed to issue any definitive suggestion); Victory Transp. Inc. v. Comisaría General, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (in absence of suggestion of sovereign immunity by State Department, independently determining under State Department principles whether or not such immunity should apply).

91. *See* text preceding note 62 *supra*.

92. *See* note 12 *supra* and accompanying text. For a discussion of the scope of

The court apparently was not concerned that extending the sovereign compulsion defense to activities carried on outside of the territory of the directing foreign government enables such a government to interfere unnecessarily with the regulation of American business and commerce. Under the *Interamerican* rationale, for example, a court would be powerless to attach liability to American tobacco buyers, who purchase some tobacco in Turkey, for refusing to deal with United States sources pursuant to a directive by the government of Turkey. While such immunity may be desirable under some circumstances, it unduly restricts the effectiveness of the antitrust laws to require a court automatically to grant immunity for all anticompetitive activities, regardless of their locus, merely because they were ordered by foreign sovereigns.

A third factor that should be considered in determining whether the sovereign compulsion defense should be allowed is the degree of the compulsion. There are two facets of the degree question: how much of the defendant's conduct was actually compelled and what sanctions would have been imposed by the foreign sovereign for noncompliance. Immunity under the sovereign compulsion defense should not extend to acts merely requested or advised[93] or to acts that go beyond those actually compelled by the foreign government.[94] Similarly, immunity should not be available if the consequences of violating the foreign sovereign's directive are minor. On the other hand, if compliance is required in order for the defendant to continue doing business in the foreign country, the equities for allowing the sovereign compulsion defense are much stronger.

The impact of the defendant's compelled activity upon American economic policy is a fourth factor that a court should consider. A foreign government may easily have economic policies and purposes that are inconsistent with the policies of the United States. An example of this inconsistency can be found in the *Interamerican* case, in which the court observed that Venezuela's purpose behind its directives may have been to cartelize the international market in

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governmental directives under the *Interamerican* approach, see notes 63-67 *supra* and accompanying text.

93. The Supreme Court has previously disallowed immunity for acts merely permitted by foreign law or government but not actually compelled. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962) (discussed in text accompanying notes 24-27 *supra*); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

94. The Supreme Court has refused to grant immunity for acts that go beyond those actually compelled by the foreign government. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. 77,414 (S.D.N.Y. 1962) (discussed in notes 28-32 *supra* and accompanying text). *Cf.* Kawakita v. United States, 343 U.S. 717, 735 (1952) (discussed in text accompanying notes 69-71 *supra*).

crude oil.[95] To confer automatic immunity upon a defendant who is complying with a foreign sovereign's directive that has a purpose adverse to American economic policy would be to give such foreign governments a potentially powerful tool for undermining, or at least interfering with, American policy.

A fifth factor is the quantitative and qualitative impact of the defendant's conduct upon competition and commerce. A study of this factor would consider, among other things, the nature of the market in which the restraint on trade occurred, the nature of the parties involved, and the nature of the offense itself. A restraint occurring in a highly concentrated industry, such as the automotive industry, is more difficult to accept than a restraint in a more competitive industry, such as fishing.[96] Similarly, it is easier to accept the settled consequences of a refusal to deal than the uncertain and prospective consequences of a continued vertical or horizontal system of price maintenance.[97] The weight attached to this factor would vary according to degree: the greater the damage to free competition, the less reason to allow the defense of sovereign compulsion.

A sixth factor deserving of some weight is the nationality of the defendant. American courts have traditionally refused to recognize any rights in foreign nationals to different treatment under the Sherman Act.[98] However, when weighing the equities of allowing a sovereign compulsion defense, a court might consider the fact that the defendant is a foreign national whose acts were compelled by its

95. *See* text accompanying note 62 *supra*.

96. Thus, the more competitive the market in which the restraint occurs, the more likely that a court would allow the defense of sovereign compulsion. Such an approach is consistent with the recent judicial tendency disfavoring oligopolistic firms. *See* Bradley, *Oligopoly Power under the Sherman and Clayton Acts: From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967). In a broad range of cases, the courts have indicated that various types of activity will violate the antitrust laws when carried out by an oligopolist while the same activity will not be illegal when carried out by a "true competitor." *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969) (exchange of price information among competitors); United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (horizontal merger); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (conglomerate merger); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (joint venture); Simpson v. Union Oil Co., 377 U.S. 13 (1964) (retail price maintenance through consignment agreements).

97. A vertical price maintenance system occurs when the parties in a seller-purchaser relationship agree on sale and/or resale prices. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960). A horizontal price maintenance system is created when parties of the same economic function, such as two wholesalers or two retailers who are usually, but not necessarily, competitors, agree upon sale prices. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25 n.59 (1940). However, even certain types of systems of horizontal price maintenance differ in their impact upon competitive forces. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969).

98. *See, e.g.*, United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. 77,414 (S.D.N.Y. 1962) (discussed in notes 28-32 *supra* and accompanying text), in which the court refused to treat the Swiss nationals any differently than the American nationals when applying the Sherman Act.

own government. The justifications for requiring conduct abroad by foreign nationals to comply with American antitrust law in sovereign compulsion situations are not nearly as compelling as when the defendants are American nationals.[99]

Furthermore, in keeping with the equitable nature of the balancing approach, a court should consider as a seventh factor the defendant's prior knowledge of the restraint. Granting immunity would seem somewhat justified if the defendant had begun doing business in the foreign country before the activities complained of were compelled by that country's sovereign. Conversely, a court should have less patience with a defendant who initiated activities in a foreign country knowing that he would be required by that country's government to engage in acts violative of American antitrust laws.

It is submitted that factors such as the seven discussed above should be considered by a court in determining whether to apply the doctrine of sovereign compulsion. The weight that a court might actually accord such factors would, of course, depend upon the particular fact situation involved in each case. However, balancing determinations entail considerable uncertainty and cannot provide much predictability; when a business is confronted with the harsh choice of discontinuing business in a foreign country or facing a crippling treble-damage action in the United States, such unpredictability is undesirable. Accordingly, if the sovereign compulsion defense is to offer meaningful protection to Americans doing business abroad, a strong presumption in favor of allowing the defense should attach once a showing of actual compulsion has been made. Under such a presumption, a strong showing of other factors would be necessary in order to defeat the defense.

Such a presumption would afford ample protection for American businesses abroad. Were the courts willing to adopt such a presumption, businessmen would only infrequently be required to terminate their foreign investments in circumstances involving sovereign compulsion. Although this presumption clearly would not remove all uncertainty from the minds of Americans doing business abroad, it should be of substantial value in affording them guidelines to follow in their decision-making.

Establishing a presumption in favor of allowing the defense of sovereign compulsion would also aid American courts in their efforts to maintain international comity. It has long been a basic policy of the federal courts that the judicial power of the United States should not be asserted "over affairs in the domain of others

99. For a brief discussion of the desirability of allowing flexibility in the application of American antitrust laws to foreign nationals, see J. Rahl, *supra* note 30, at 357-59.

unless there is demonstrable national interest sought to be protected or public harm sought to be prevented."[100] The proposed approach would further the policy objectives of fairness to businesses abroad and of international comity, yet would be flexible enough that it would not unduly frustrate American antitrust policy.

IV. Practical Application of the Proposed Balancing Approach

It is not suggested that the practical application of the proposed balancing approach would always be easy or that the outcome of the determination would invariably be predictable. However, the balancing approach would at least give a court considerable flexibility in determining the equities of a particular case—flexibility that is not available under the limited approach adopted by the court in the *Interamerican* case. Moreover, the consideration of these factors should be no more difficult for a court than the similar balancing that it is required to undertake in most equity cases.

The operation of the proposed approach may best be understood by applying it to two factual situations. In the *Continental Ore* case,[101] Electro Met, a subsidiary of Union Carbide, had been appointed the exclusive purchasing agent of vanadium for the Canadian Government. Continental Ore alleged that Electro Met had conspired with its parent so that the advantages obtained from possession of the exclusive franchise might be used to monopolize vanadium production and sales in Canada. The Supreme Court refused to immunize Electro Met from liability simply because in its agency capacity it was acting in a manner "permitted by Canadian Law."[102] A different question would have arisen had the Canadian Government *ordered* Electro Met to deal solely with Union Carbide. The answer of the district court that decided the *Interamerican* case would be evident: once the defendant had proved the fact of compulsion, the defense of sovereign compulsion would have exonerated him from liability. The disquieting policy implications of this arbitrary approach have already been discussed.[103]

Under the suggested approach, once Electro Met had proved the fact of compulsion, a presumption would arise that it was entitled to claim the defense of sovereign compulsion. The burden would then fall on the plaintiff to bring to the court's attention circumstances that justified disallowing the defense. One of the first things

100. Brewster, *Extraterritorial Effects of the U.S. Antitrust Laws: "An Appraisal,"* 11 ABA Antitrust Section Proc. 65, 70 (1957). *See* notes 37-54 *supra* and accompanying text.

101. 370 U.S. 690 (1962). *See* text accompanying notes 24-27 *supra.*

102. 370 U.S. at 707.

103. *See* pt. II. *supra.*

the court might properly consider would be the impact of the allegedly illegal activity upon the foreign policy and national interests of the United States. If the executive branch did not submit to the court a statement indicating whether it felt that the concerted agreement between Electro Met and Union Carbide adversely affected national interests, the court might examine the motivating factors behind the Canadian Government's order. In this case, the purpose seems to have been to insure an adequate supply of vanadium to support Canadian defense preparedness.[104] Since Canada maintains a close military alliance with the United States, it can be assumed that improvement in the Canadian defense posture is not adverse to American interests. An inevitable consequence of the Canadian government's order, however, would be a dilution of the vigor of free competition in the vanadium market. The domestic and foreign commerce of the United States undoubtedly would be sufficiently affected to enable the courts of the United States to assert jurisdiction over the activities involved.[105] However, effects on commerce more substantial than those necessary to confer jurisdiction should be required in order to defeat a claim of sovereign compulsion.[106] In this case, it seems that in any real quantitative sense, the American economy would not have been materially affected. It should be further noted that all of the overt activities carried on took place within the territorial limits of Canada;[107] there was no attempt to use Canada as a refuge for far-reaching illegal actions.

At least two other factors would remain for the court to consider, but they cannot be evaluated in this discussion because the report of the decision provided insufficient information. The court should determine the nature of the compulsion applied by the Canadian Government and the possible consequences faced by Electro Met should it refuse to comply with the order. The court should also balance the potential consequences to the defendant resulting from noncompliance with the actual injury sustained by the plaintiff. Subject to the outcome of these two determinations, it appears from the information available that a court confronted with the facts here under discussion would strike the over-all balance in the defendant's favor and grant a motion to allow the defense of sovereign compulsion.

The foregoing method of analysis also could be applied in the *Interamerican* case. The court would begin with a presumption in the defendant's favor, since adequate proof was presented demon-

104. *See* 370 U.S. at 702 n.11.

105. *See* notes 1 & 3 *supra*.

106. *See* notes 96-97 *supra* and accompanying text.

107. Although all overt acts were carried out within Canada, part of the alleged conspiracy was planned in the United States. 370 U.S. at 706.

strating the existence of actual compulsion.[108] While the executive branch of the United States Government did not submit a statement in *Interamerican* commenting upon the nature of the national interests involved, it appears that the purpose of the Venezuelan Government was in part to cartelize the international market for crude oil.[109] Thus, the court could properly conclude that the purpose of the Venezuelan order was contrary to American economic goals.

On the other hand, although the impact on the plaintiff of the defendants' compliance was disastrous, the impact upon over-all competition in the field did not extend beyond the plaintiff, and hence was not great. An additional factor operating in favor of the defense's application was the fact that the activities of Monven and Supven resulting from the compulsion to refuse to sell crude oil either directly or indirectly to the plaintiff were territorially confined to Venezuela. Hence, the equities weighing against these defendants' case appear to be insufficient to overcome the strong presumption invoked in order to provide adequate protection for American business abroad and to prevent unnecessary strains upon international comity. Since the balance of relevant considerations remains in these defendants' favor, the sovereign compulsion defense should be allowed.

The situation is different, however, with respect to Amoco. Amoco was an international trading company whose only contacts with Venezuela constituted purchasing crude oil from Venezuelan producers and shipping it to refinery buyers. By its agreement with Monven and Supven, it extended the scope of the Venezuelan Government's orders to activities outside Venezuelan territory. While a definite conclusion cannot be reached concerning the issue of Amoco's liability because of the insufficient amount of information available, this factor should weigh against allowing Amoco to use the shield of sovereign compulsion. Further relevant questions might include determinations whether any sources of Venezuelan crude oil were open to Amoco for shipment to the plaintiff aside from Monven and Supven and whether Amoco attempted to find alternative sources of crude oil in the Middle East for Interamerican.[110]

V. Summary

In an era of increasing concern by governments with the trade and economic policies of their nations, economic conflicts between countries may be expected to continue to arise; and along with this

108. *See* notes 14-17 *supra* and accompanying text.

109. *See* text accompanying note 62 *supra*.

110. In *Interamerican* Amoco alleged it had tried and failed to secure alternative sources of oil. *See* Joint Reply Brief on Behalf of Defendants at 18, Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

rise in conflicts an increasing frequency in instances of sovereign compulsion situations may be expected. As this occurs, American courts should not refrain from recognizing the validity of the sovereign compulsion defense, nor should they shy away from applying it when needed. But in applying it, the courts should not adopt a wooden and inflexible approach. The twin policies of intergovernmental comity and fairness are not unobtainable or mutually exclusive. A court may well maximize the pursuit of these goals and safeguard essential national interests as well if it approaches the sovereign compulsion situation in a spirit of flexibility—seeking to obtain maximum latitude in order to enable it to review all of the important considerations with which it is then confronted.